(2)

No. 96-272

In The

Supreme Court of the United States

October Term, 1995

METROPOLITAN STEVEDORE COMPANY,

Petitioner,

v.

JOHN RAMBO and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. After an initial determination that a Claimant has suffered a serious medical disability which produced economic harm, does *33 U.S.C.* 908(h) permit a nominal award for the purpose of preserving a Claimant's right to receive compensation into the future?

2. Is the decision of the Court of Appeals in conflict with a decision of another United States Court of Appeals?

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I. STATUTORY PROVISION INVOLVED

33 *U.S.C.* Section 908(h)

> (h) The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: Provided, however, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

II. STATEMENT OF THE CASE

The Respondent, John Rambo, ("Rambo") a longshoreman, injured his back and leg within the course and scope of his employment on September 9, 1980, while employed by Petitioner, Metropolitan Stevedore Company ("Metropolitan").

Rambo filed a claim with the United States Department of Labor and trial was set before an Administrative Law Judge ("ALJ") in 1983. At the trial the parties stipulated among other things:

> "That the employee sustained an over-all current permanent partial disability equivalent to 22 1/2% of the whole person which the parties recognize as an 'economic disability' producing a weekly wage loss of $102.24 per week with an equivalent compensation rate of $80.16 per week for permanent partial disability."

On November 28, 1983 the ALJ issued a Decision and Order awarding benefits to Rambo at the rate of $80.16 per week for permanent partial disability.

On October 30, 1989, Metropolitan filed with the Department of Labor an "Employer's Application For Modification, Section 922."

A Formal Hearing on the Modification was convened on October 15, 1990 by the ALJ.

At the outset of the proceeding Claimant moved to dismiss on the grounds that the Petition was unsupported by evidence of a change in Rambo's physical condition. In reliance on existing case law and this Motion, Rambo presented no evidence. In support of its Petition Metropolitan offered only Rambo's post injury earnings. Metropolitan called Rambo as the only witness.

Rambo's testimony was uncontroverted that his physical condition had not changed since the Stipulated Award issued in 1983; and, that his permanent partial disability reduced his ability to perform his pre-injury work. Rambo also testified that he was presently employed as a longshore crane operator, was earning more than he had before his injury and that he did not know how long the crane job would last.

The ALJ ruled that Rambo's new job was a "change in conditions" that supported modification and terminated Rambo's benefits. The Benefits Review Board ("BRB") affirmed. Rambo appealed to the Ninth Circuit Court of Appeals.

The Court of Appeals reversed the BRB in the belief that the "change in conditions" requirement for an award modification under Section 922 required proof that Rambo had undergone a change in his physical condition.

The Supreme Court reversed, holding "that a disability award may be modified under Section 22 . . . without any change in the employee's physical condition." *Metropolitan Stevedore Co.*, 115 S. Ct. at 2150. The Supreme Court remanded the case "(b)ecause Rambo raised other arguments before the Ninth Circuit that the panel did not have the opportunity to address." Id. Emphasis added.

The two issues raised by Rambo and not decided were:

> (1) Should the employer be estopped from filing a 33 U.S.C. Section 922 Petition for Modification because of the representation of its attorney to "Rambo" that the award would be paid for life?
>
> (2) Given the 1983 Stipulated Decision and Order of Permanent Disability Benefits, "in the interest of justice", should this case be remanded for the entry of a nominal award of loss of wage earning capacity?

III. THE NINTH CIRCUIT COURT OF APPEALS DECISION

A. THE FIRST ISSUE REMANDED – ESTOPPEL

In a split decision, the Court held that Metropolitan could seek modification of the prior award of permanent partial disability benefits because, " . . . reliance on Metropolitan to Rambo's detriment" was not established by the record.

B. THE SECOND ISSUE REMANDED – NOMINAL AWARD

In a unanimous decision the Court of Appeals stated that the propriety of a nominal award was properly before it on appeal. The Court cited *Young v. Todd Pac. Shipyards Corp.*, 17 BRBS 201, 204 n.2 (1985).

The Court next addressed the propriety of a nominal award in a modification proceeding and stated that the issue had not been determined by the Ninth Circuit. The Court stated, "The Second, Fifth and District of Columbia Circuits have ruled that nominal awards may be used to preserve a possible future award where there is a significant physical impairment without present loss of earnings." *Rambo v. Metropolitan* Petitioner's Appendix 1, Pg. 11A.[1]

The Court reviewed *33 U.S.C.* 922 and noted that it provides that compensation cases may be reviewed and a new compensation order issued which terminates, continues, reinstates, increases or decreases an award, at any time prior to one year after the date of last payment of compensation or the rejection of the claim.

In reviewing *33 U.S.C.* Section 908(h), the Court emphasized the statutory language that, " . . . The deputy Commissioner **may**, in the **interest of justice, fix** such **wage earning capacity as shall be reasonable**, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which **may** affect his capacity to earn wages in his disabled condition, **including the effect of disability as it may naturally extend into the future**."

The Court noted that, "This section (908(h)) 'allows the (ALJ) to consider the future effect of a disability' citing *Todd Shipyards v. Allan*, 66 F.2d 399 (9th Cir. 1982),

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[1] In *Randall v. Comfort Control, Inc.*, 725 F.2d 791 (D.C. Cir. 1984), the District of Columbia Court of Appeals exhaustively analyzed the interrelationship between Section 922 and Section 908(h), and authorized a nominal award.

In *LaFaille v. B.R.B.*, 864 F.2d 54 (2nd Cir. 1989) the Director, OWCP, argued to the Court that Section 908(h) permitted de minimus awards and the court agreed.

In *Hole v. Miami Shipyards*, 640 F.2d 769 (5th Cir. 1981), the Court reviewed both Section 922 and Section 908(h) and held that the statutory scheme permitted de minimus awards.

cert denied, 459 U.S. 1034, 103 S.Ct. 444, 74 L.Ed 2d 600, Citing *Hole v. Miami Shipyards Corp.*, 640 F.2d at 772." (Petitioner's Appendix 1 Pg. 12A)

After reviewing the evidence the Court HELD that:

> "Looking at the evidence as a whole, the ALJ's Decision to terminate Rambo's benefits is NOT *supported by substantial evidence* and the BRB erred in affirming the ALJ's Order". (Petitioner's Appendix 1, Pg. 13a; Emphasis added).

Finally, the Ninth Circuit Court of Appeals:

1. Concluded quoting the ALJ in *Hole v. Miami Shipyards Corp.*, 640 F.2d at 773 (5th Cir. 1981), that, " . . . a small award fashioned expressly for the purpose of preserving (Rambo's) right to receive compensation should disability in an economic sense ever visit him." was appropriate in this case; and,

2. Remanded for entry of a nominal award.

IV. SUMMARY OF ARGUMENT

By ignoring the statutory framework and pertinent legislative history of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), the Petition presents an incomplete and inaccurate picture of **both** the intent of Congress and the propriety of the decision of the Ninth Circuit Court of Appeals. The LHWCA is a comprehensive scheme to provide compensation for disability (or death) of a covered employee, including the effect of disability as it may naturally extend into the future and through the employee's lifetime.

The legislative history of the LHWCA clearly shows that as early as 1938 when Congress amended the Act and added Section 908(h), Congress intended a "forward looking" perspective in the consideration of an employee's disability and Congress was concerned that the beneficent purpose of the Act might be defeated by the one year limitations period for modification if the future effects of disability were not taken into account. In the years that followed, the Courts were left to determine the best method to take account of unknown future effects of disability. Where an employee clearly has sustained a serious medical disability which may cause economic harm in the future, but has no current loss of earnings, the Courts have **uniformly** arrived at the solution of granting a small or nominal, running award to further the beneficent purposes of the Act and Congress' mandate that due concern be given to the effect of disability as it **may** naturally extend into the future.

In proposed Amendments to the LHWCA in 1983 and 1984, the Congressional Committee on Labor and Human Resources recommended eliminating **both** the one year limitations period for modification contained in Section 922 and the "forward looking" language of Section 908(h). The language of the Committee's report clearly makes reference to the nominal, running awards developed by the Courts in cases where workers suffered a major industrial injury which could cause future economic harm and where rejection of the claim would have required a request for modification within a year pursuant to Section 922, whether or not such a new claim

was justified. Congress **rejected** the proposed amendments and reenacted Section 908(h) intact, fully aware of the "solution" developed by the Courts.

In addition to this clear demonstration of Congressional intent, the Director, OWCP (the Administering Agency for the LHWCA) has also advocated the use of nominal, running awards. Based upon the statutory scheme, the legislative history and beneficent purpose of the Act, this position is a reasonable construction entitled to deference.

Finally, there is no conflict in any Circuit Court of Appeals regarding the use of nominal, running awards in the appropriate case. Petitioner misstates the decision in *Fleetwood v. Newport News*, 776 F.2d 1225 (4th Cir. 1985) in an attempt to create a conflict with the case at bar. In fact, the *Fleetwood* Court simply reviewed the evidence and found that the employee no longer had a loss of wage-earning capacity and, thus, that a nominal, running award was not appropriate on the particular facts of that case. The Ninth Circuit Court of Appeals herein made exactly the same type of review of the evidence as the Fourth Circuit did in *Fleetwood*. Based upon the factual record in *Rambo*, including the stipulation of the parties as to a 22 1/2% permanent partial disability sustained by Rambo and uncontradicted evidence that Rambo's physical condition had not changed, the Ninth Circuit simply reached a different decision regarding Rambo's entitlement to a nominal, running award. Contrary to the assertions of the Petitioner the decision of the Ninth Circuit herein does **not** overstep the Court's judicial authority or usurp the legislative role. Therefore, the Petition For Writ of Certiorari should be denied.

V. ARGUMENT

A. STATUTORY FRAMEWORK

"The LHWCA is a comprehensive scheme to provide compensation in respect of disability or death of an employee . . . if the disability or death results from an injury occurring upon navigable waters of the United States . . . LHWCA *33 U.S.C.* Sec. 903A." *Metropolitan Stevedore Company v. Rambo (Rambo I)*, 115 S.Ct. 2144, 2145 (1995).

"Disability under the LHWCA, . . . may be ascertained for nonscheduled injuries according to the employee's actual earnings, if they fairly and reasonably represent his wage-earning capacity and if they do not, then with due regard to the nature of the employee's injury, the degree of physical impairment, his usual employment and any other factors or circumstances in the case which may effect his capacity to earn wages in his disabled condition including THE EFFECT OF DISABILITY AS IT MAY NATURALLY EXTEND INTO THE FUTURE." Id. at Pg. 2146. (Emphasis added).

" . . . the Act is designed to compensate for any injury related reduction in wage-earning capacity through the Claimant's lifetime". *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 795 (D.C. Cir. 1984).

The "forward looking" perspective of Section 908(h) which allows for the consideration of the future effects of disability must be read in **conjunction** with the relatively short statute of limitations to understand the **statutory scheme**. *Randall*, 725 F.2d at Pg. 795. (Emphasis added)

The Act contains the provision which grants discretion to set wage-earning capacity in the **interest of justice** because Congress realized the potentially harsh effect of the relatively short statute of limitations in a case where Claimant's post injury earnings are equal or greater than his earnings prior to his injury. *Randall*, 725 F.2d at Pg. 795; *Hole*, 640 F.2d at Pg. 772.

"When it is clear that a claimant has suffered a medical disability and there is a significant possibility that the Claimant will at some future time suffer economic harm as a result of his injury, but present circumstances make the extent of the economic injury unknowable, the **beneficent purposes** of the Act and the **mandate** that due concern be given to the effect of disability as it may naturally extend into the future are furthered by granting . . . " a nominal award. *Randall*, 725 F.2d at Pg. 800.

B. LEGISLATIVE HISTORY

As originally enacted the Act did not contain a Section 908(h). In 1938 Congress Amended the Act and added Section 908(h) in essentially the same language as it exists today.

The Committee of the Whole of the House of Representatives in Report No. 1945 as incorporated verbatim in the Senate Committee on the Judiciary Report No. 1988 at Pg. 5 reported on the Congressional intent of Section 908(h). In unmistakably colorful language Congress specifically coupled Section 908(h) with the limitations period of Section 922. It specifically authorized the fixing of awards to run into the future for the purpose of avoiding the limitation period of Section 922. So that

there can be no doubt on these points as to the Congressional intent, the following is a verbatim statement of the Congressional Report.

> "The proposed amendment adding subdivision (h) to section 8 is to clarify the interpretation to be placed upon the words "wage-earning capacity" used in the act in connection with partial-disability cases. The absence of clarity in the Longshoremen's Act in this respect has been productive of wasteful litigation which has not resulted in settling the complex question of the proper factors to be considered in connection with the determination of an employee's wage-earning capacity after injury. A provision to accomplish the same general purpose was added to the New York workmen's compensation law in 1930, which will be found as subdivision 5-a of section 15 of the New York act. The proposed amendment is constructed partly after the New York provision, with an addition thereto incorporating, for clearness and for assistance to the deputy commissioners and others, a general reference to the factors to be considered in determining an employee's wage-earning capacity.
>
> It also provides for consideration of the effects of an injury causing permanent partial disability, upon the employee's **future ability** to earn. The proposed changes have been made with the view to having wage-earning capacity determined upon considerations which the courts have found to be just and proper. Often an employee returns to work earning for the time being the same wages as he earned prior to injury, although still in a disabled condition and

with his opportunity to secure gainful employment definitely limited. For instance, an employee may have an industrial hernia, retainable by a truss but not operable; but his old employer might be willing to continue him on in employment at the rate of pay at time of injury notwithstanding his impaired condition, particularly where the job does not require able-bodied labor. It is clear that in such a case the employee's ability to compete in the labor market has been definitely affected; and, though at present the employee is paid his former full-time earnings, he suffers permanent partial disability which should be compensable under the Longshoremen's Act, considering not only the present effect of the disability on the employee's wage-earning capacity but also the **future consequences of such disability on the employee's capacity to earn as it naturally extends into the future**. The Longshoremen's Act should provide that the Deputy Commissioner may consider all of the factors which the more recent trend of decisions indicates are the logical and proper factors in the determination of wage-earning capacity.

In a case such as that referred to above where the employee returns to employment without apparent wage loss, notwithstanding impairment of physical condition and **probable impairment** of future wage-earning capacity an unscrupulous employer might with profit to himself continue the original wages, particularly if low, until the **limitations in the act** with respect to the filing of claim for compensation and **right of review** of the case **(Sec. 22)** had run, after which time the employee's right to compensation would be **barred** and the

employee if then cast adrift would become and remain an object of charity. It can be seen that an unscrupulous employer might thus defeat the **beneficent provisions of the Longshoremen's Act**. Court decisions recognizing factors other than actual wages paid after injury are *Dragons* case (161 N.E. 816, Mass); *Roller v. Warren* (129 Atl. 158, Vt.); *Postal Telegraph Cable Company v. Industrial Accident Commission of California* (3 Pac. 2d 6); *Hartford Accident & Indemnity Company v. Hoage* (85 Fed. (2d) 42) 420." (Emphasis added).

S. Rep. No. 1988, 75th Cong., 3d Sess. 5-6 (1938).

Each case cited in the Congressional record involved an injured worker who earned the same wages after the accident. In each case the Court held that the employee was entitled to an award to compensate him for his loss of wage-earning capacity. The loss of wage-earning capacity was measured by comparing the employee's pre-injury actual wages without physical impairment and the employee's ability to earn wages post injury with physical limitations caused by the injury.

In proposed Amendments in 1983 and 1984, Congress again coupled Section 908(h) and Section 922. These Amendments proposed that Section 922 be amended to eliminate the one year limitations period concomitantly eliminating from Section 908(h) the phrase "as it may naturally extend into the future." The resulting statutory framework would have eliminated a need for continuing awards running into the future because the one year limitations period would be eliminated. The Committee on Labor and Human Resources in Report No. 98-81 (May 10, 1983) at Pg. 37 stated:

"MODIFICATIONS

Consistent with the change made in Section 8(h) on the issue of wage earning capacity, the one year time limit for modification of awards has been eliminated . . . This Amendment promotes equity by permitting all parties to apply for modification of awards at any time after an award is entered. The one year limitation was unreasonably short in light of the long term effects of the major industrial injuries sustained by workers covered by the Act. As a consequence, Administrative Law Judges felt compelled to award benefits for wage loss at the rate of **one percent** in cases where rejection of the claim would have required a request for modification within a year, whether or not such a new claim was justified. The **NEW APPROACH** is far more realistic, allowing claimants for example, to apply for increased benefit for wage loss or for greater physical disability at a time when full effects of an injury may manifest themselves. Requests for modification will no longer be necessary simply to keep the statute of limitation from running." (Emphasis added).

C. CONGRESSIONAL INTENT

In a statutory construction case, the beginning point must be the language of the statute and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances is finished. *Estate of Cowart v. Nicklos Drilling Co.*, 112 S.Ct. 2589 (1992).

Section 908(h) clearly states that the Court **may** fix wage-earning capacity as shall be reasonable including

the effect of disability as it may naturally **EXTEND** into the **FUTURE**. The normal meaning of the language of the Statute clearly permits awards of any amount for loss of wage-earning capacity to extend into the future.

"We have often relied on Congress's reenactment of statutory language that has been given a consistent judicial construction in particular where Congress was aware of or made reference to that judicial construction". Rambo I at Pg. 2144.

In the proposed amendments in 1983 and 1984 the Legislative history of Section 908(h) and Section 922 clearly referred to *Hole v. Miami* (supra) with reference to a **one percent award**. Congress rejected the amendments and reenacted Section 908(h) intact.

Therefore, the Congressional intent so clearly and colorfully stated in 1938 and reenacted without change after a reference to *Hole* makes it clear Congress mandated that Courts **may**, where appropriate, under the circumstances of each case, in the **interest of justice**, fix wage-earning capacity into the **future** in any amount so that an employee will not be barred from presenting a claim because of the limitation period contained in Section 922.

The language of Section 908(h) is clear. The Legislative history of Section 908(h) is clear in both 1938 and 1984. Congress intended to allow awards in any amount to extend into the future and the Court of Appeals did exactly that in this case.

D. DEFERENCE

"If the Court determines Congress has not directly addressed the precise question at issue, the Court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the Court is whether the agency's answer is based upon a permissible construction of the statutes." *Chevron U.S.A., Inc., v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The Director, OWCP, through a delegation of powers from the Secretary of Labor is the Administrating Agency for the LHWCA.

The Director in *LaFaille v. B.R.B.*, 884 F.2d at Pg. 62, argued for a de minimus award. The Agency's position was based upon the statutory scheme, legislative history and the beneficent purpose of the Act. Such an interpretation is a reasonable construction and is therefore entitled to deference.

Under either the plain meaning of the language of Section 908(h); or, the deference due the Director, the issue of the propriety of nominal awards running into the future was authorized and intended by Congress.

E. NO CONFLICT BETWEEN CIRCUITS

There is absolutely no split in the Circuits on the issue of de minimus awards. Petitioner asserts that the decision in the case at bar is in conflict with the decision in *Fleetwood v. Newport News*, 776 F.2d 1225 (4th Cir. 1985).

This statement is erroneous. The *Fleetwood* majority at 776 F.2d, Pg. 1234 cites in its footnotes the decision of the D.C. Circuit in *Randall* (supra) and the 5th Circuit in *Hole* (supra) **without criticism**. The *Fleetwood* majority examined the factual record to determine if there was substantial evidence to support the finding that the Claimant suffered a loss of wage earning capacity. The *Fleetwood* Court concluded that, "Our review of this evidence leads us to conclude that *Fleetwood* . . . no longer has a wage-earning capacity loss. . . . " The Court's factual finding foreclosed a decision on a de minimus award. This issue was not addressed by the *Fleetwood* court.

VI. CONCLUSION

In the case at bar, the Ninth Circuit Court of Appeals reviewed the factual record. That record contained the parties **stipulation** that Rambo, " . . . sustained an over all permanent partial disability of 22 1/2% of the whole person which the parties recognize as an '**ECONOMIC DISABILITY**' " (emphasis added).

The Ninth Circuit Court of Appeals also noted that it was uncontested that Rambo's physical condition had not changed since 1983 and that Rambo's permanent partial disability reduced his ability to perform his pre-injury work. Based upon this review, the Court concluded that, "This wage earning capacity loss was sufficient to support a weekly benefit award." The Court stated, "Looking at the evidence as a whole, the ALJ's decision to terminate Rambo's benefits is not supported by substantial evidence". The Court ordered the case remanded for entry of a nominal award.

Petitioner asserts that the decision of the Court of Appeals willfully ignored the plain language of Section 922 which permits modification only within one year of the last payment of compensation or rejection of the claim. Petitioner argues that by entering a running, nominal award the Court of Appeals intentionally attempted to overrule the intent of Congress expressed in the one year limitation of Section 922. Petitioner carefully points out that there have been numerous attempts to eliminate the one year limitation period of Section 922 – all of which have failed.

What Petitioner fails to point out to this Honorable Court is that, as far back as 1938, Congress linked the provisions of Section 922 with those contained in Section 908(h). This coupling of Section 922 and Section 908(h) continued through the last amendment of the LHWCA in 1984. Nothing could be clearer than the 1984 Report from the Committee on Labor and Human Resources which recommended a "New Approach" by eliminating *both* the one year limitation of Section 922 and the Section 908(h) phrase " . . . as it may naturally extend into the future." Petitioner has presented only half of the picture.

In fact, the legislative framework since Section 908(h) was enacted in 1938 contemplates running awards when there has been a loss of wage-earning capacity whether it be one percent, five percent, ten percent, 22 1/2 percent, a de minimus award or a nominal award. The Act states that the Court **may** enter this type of award.

In Section 908(h) Congress allows the Courts to consider " . . . any other factors or circumstances in the case

which **MAY** affect his capacity to earn wages in his disabled condition, including the effect of disability as it **MAY** naturally extend into the future." (Emphasis added). By using the term "**MAY**", Congress clearly authorized Courts to award whatever benefits it deems appropriate if, in the Court's opinion, loss **MAY** at some future date materialize. This is the plain meaning of Section 908(h). It is a distinction without a difference to argue as the Petition does that the Court must couch such an award upon the future possibility, probability or inevitability of future economic harm. Only one being knows the future. Recognizing that, Congress set forth in Section 908(h) factors to be considered in assessing whether or not there was a loss of wage-earning capacity including "the effect of disability as it may naturally extend into the future." After considering these factors, if the Court finds a loss of wage-earning capacity it **may** enter that award to run into the future subject to further modification.

In fact every Court of Appeals that addressed the issue of nominal running awards under Section 908(h) has approved them. Every Court of Appeals approved such awards on the basis that Congress clearly authorized them in Section 908(h).

Therefore, this Petition does not present to this Court the refusal of a Court of Appeals to follow the intent of Congress. It does not present the issue of a Court of Appeals that refused to follow this Court's directive to enforce the plainly expressed intent of Congress. It does not present to this Court the issue of the Circuits interpreting an Act of Congress differently. Contrary to the assertions of Petitioner, the Court of Appeals in this case

did not overstep its judicial authority or usurp the legislative role. It simply followed the clear intent of Congress to allow consideration of, among other factors, the future effects of a proven disability through the use of a running, nominal award. This Petition does not present any other issues.

Consequently, the Petition For Writ of Certiorari should be denied.

Respectfully submitted,

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